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No. 80-1745

IN THE

Supreme Court of the United States

October Term, 1980

F. W. WOOLWORTH CO., *Appellant,*

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, *Appellee.*

On Appeal from the Supreme Court of New Mexico

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico, on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

ARGUMENT

The primary constitutional issues raised by the appellant have been answered by this Court in its recent decisions in *Mobil Oil Corp. vs. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) and *Exxon Corp. vs. Wisconsin Department of Revenue*, 447 U.S. 207 (1980). Appellant also raises some arguments in this Court which were never developed in the appropriate forum below, and consequently are not properly before this Court for review.

1. Woolworth's Dividend Income is Apportionable Business Income, Under *Mobil*.

In the context of income generated by the activities of an interstate business, the Due Process Clause of the United States Constitution imposes two restrictions on the power of the state to tax that income: first, there must be some minimal connection between those activities and the taxing state; and secondly, the income taxed by the state must be rationally related to "values connected with the taxing state." *Moorman Mfg. Co. vs. Bair*, 437 U.S. 267 (1978). Where the business is a unitary one, these requirements have been held to be satisfied by taxing schemes which apportion all the business income of the unitary business by means of a formula which compares the activities of the business within the taxing state relative to its activities everywhere. *Butler Bros. vs. McColgan*, 315 U.S. 501 (1942); *Bass, Ratcliff & Gretten, Ltd. vs. State Tax Commission*, 266 U.S. 271 (1924); *Underwood Typewriter Co. vs. Chamberlain*, 254 U.S. 113 (1920). If the business is a unitary one, then this apportionment formula obtains a "rough approximation" of the business income reasonably related to the taxing state. *Exxon Corp. vs. Wisconsin Department of Revenue*, 447 U.S. 207 (1980). These general rules have been held applicable unless the taxpayer is able to show that the formula prescribed by the state operates to tax the taxpayer's income to a degree

out of all proportion to activities of the taxpayer in the taxing state. *Moorman Mfg. Co. vs. Bair, supra;* see, e.g., *Hans Rees' Sons, Inc. vs. North Carolina ex rel. Maxwell,* 283 U.S. 123 (1931).

This Court recently affirmed that these general rules apply to income from intangible, as well as tangible sources. This Court in *Mobil* addressed the question of

> whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method.
>
> 445 U.S. at 435.

This Court's conclusion was that there are no significant distinctions. Relying upon many of the cases cited above, this Court concluded:

> As these cases indicate, the linchpin of apportionability in the field of state taxation is the unitary business principle (fn. omitted). In accord with this principle, what appellant must show in order to establish that its dividend income is not subject to an apportioned tax in Vermont is that the income was earned in the course of activities unrelated to the sale of petroleum products in that state.
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> 445 U.S. at 439.

Appellant interprets this paragraph and the language following it to require a court to determine whether the "underlying activity" of the "dividend-payor" is part of a "functionally integrated enterprise" being conducted by the resident corporation. In other words, appellant reads *Mobil* to require the dividend-payor corporation to be unitary with the dividend-recipient corporation, before the dividends received may be included in apportionable business income of the recipient. (Jurisdictional Statement, at 10). The Department submits that

such a reading of *Mobil* is overly broad. *Mobil* cannot be properly interpreted without reference to the cases on which the Court relies for its decision.[1] All these cases support the proposition that, if a taxpayer conducts a unitary business in more than one state, any of the taxing states may apply a tax to a reasonable portion of the entire unitary business income. Nothing in these preceeding cases can be found to require that the taxpayer be unitary with the *source* of its income. The Court in *Mobil* was not dealing with any dividend income paid from a source not unitary with the recipient, and expressly refused to reach that issue. 445 U.S. at 442. Once again, the Court rejected the argument that merely identifying a "source" for the income is sufficient to remove the amounts from apportionable income.

> Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source." Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required.
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> 445 U.S. at 438.

The focus, in determining whether income is business income, should be on the activities of the entity receiving income – is the income earned by the recipient in the regular course of its business?[2] Where the dividend-payor is unitary with the dividend-recipient, the business related nature of investment

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[1] I.e., *Butler Bros. vs. McColgan*, 315 U.S. 501 (1942); *Ford Motor Co. vs. Beauchamp*, 308 U.S. 331 (1939); *Moorman Mfg. Co. vs. Bair*, 437 U.S. 267 (1978); *Bass, Ratcliff & Gretten, Ltd. vs. State Tax Commission*, 266 U.S. 271 (1924); *Underwood Typewriter Co. vs. Chamberlain*, 254 U.S. 113 (1920). See *Mobil*, 445 U.S. at 438-439.

[2] See §7-4-2(A) N.M. Stat. Ann. (1978) set out in Appendix D of the Jurisdictional Statement.

income is obvious – the parent has invested its capital in order to expand its business, obtain a guaranteed source of supply or a steady market, or otherwise improve its business activities. See, e.g., *Montana Department of Revenue vs. American Smelting & Refining Co.*, 567 P.2d 901 (Mont. 1977), *appeal dismissed*, 434 U.S. 1042 (1978). However, investments may produce business income, even if the parent is not unitary with the subsidiary, if the taxpayer uses the income from such investments in its overall business operations. See, Dexter, *Business vs. Nonbusiness Distinction.* 10 URBAN LAWYER 243, 252 (Spring, 1978). It has long been recognized that the investments of a corporation may be integrally related with its business:

> Nor can it be justly said that the investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.
>
> *Flint vs. Stone Tracy Co.*, 220 U.S. 107 (1911).

This same relationship has been relied upon by many of the courts holding income from intangibles to be part of the apportionable business income of a taxpayer. E.g., *Qualls vs. Montgomery Ward & Co.*, 266 Ark. 186, 585 S.W.2d 18 (1979); *W. R. Grace & Co. vs. Commissioner of Revenue*, 393 N.E.2d 330 (Mass. 1979); *American Smelting & Refining Co. vs. Idaho State Tax Commission*, 592 P.2d 39 (Idaho 1979), *vacated and remanded*, 445 U.S. 939 (1980), *opinion reinstated* March 4, 1981.

Woolworth, throughout this litigation, has consistently confused the issues by failing to recognize the distinction between profits of the payor corporations and dividends received by

Woolworth from those corporations. Any question as to the existence of this distinction was laid to rest long ago by this Court:

> It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed.
>
> *Hawley vs. Madden,*
> 232 U.S. 1 (1914).[3]

Indeed, there is no necessary relation between the amount of profits received by a particular corporation and the amount of dividends passed along to its stockholders. *Mobil,* 445 U.S. at 460, n. 18 (Justice Stevens dissenting).

Woolworth's argument that extra-territorial values are being taxed is based on the premise that the location of its investment is in a foreign country. On the contrary, the income upon which Woolworth is being taxed is its income from intangibles, the location of which we cannot discern from the record. Since the dividend income is used for the general operating expenses of the corporation, there is no apparent reason for treating this income differently from any other type of business income of the unitary business.[4] The analysis of the Vermont Supreme Court in *In re Goodyear Tire & Rubber Co.,* 133 Vt. 132, 335 A.2d 310 (1975) reflects this approach. The New Mexico Supreme Court applied a similar analysis, in determining the

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[3] See also, *Klein vs. Board of Tax Supervisors,* 282 U.S. 19 (1930): "There's no doubt that a state may tax a corporation and also tax the holders of its stock. . . . The owners are different and . . . the property is different." For a detailed discussion of this idea, see Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations,* 29 VAND. L. REV. 401 (1976).

[4] Woolworth conceded at the outset of litigation that its domestic retail business is a unitary one. Taxpayer's memorandum of Law and Facts, at p. 8, submitted to Hearing Examiner.

"business" nature of the income. *Taxation and Revenue Department vs. F. W. Woolworth*, 624 P.2d 28, 34-35 (N.M. 1981). (Jurisdictional Statement, Appendix A.) *Accord, Tipperary Corp. vs. New Mexico Bureau of Revenue*, 93 N.M. 22, 595 P.2d 1212 (Ct.App. 1979), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *Champion International Corp. vs. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (Ct.App.), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1975).

Even if we accept *arguendo* Woolworth's argument that the Court's holding in *Mobil* requires unitariness between payor and payee corporations, that argument does not aid Woolworth, since that corporation is in fact unitary with the four subsidiaries under consideration here:

> On the due process issue and in conformity with *Mobil*, we hold that, for income tax considerations, there is substantial evidence in this record that Woolworth was conducting a unitary business with its foreign subsidiaries and that there is a sufficient nexus between the corporation and the state of New Mexico to justify an apportioned tax on these dividends. The income is obviously related to the mutual activities of the parent and its affiliates. The control over the subsidiaries, the interdependence, the history of the relationships, the placing of the money in the general operating account, all point to functional integration and reveal an underlying unitary business for our purposes here.
>
> *Taxation and Revenue Department vs. F. W. Woolworth*, 624 P.2d at 38.

Woolworth makes much of the evidence that its foreign subsidiaries were left to their own devices most of the time. Similar evidence was introduced in *W. R. Grace & Co. vs. Commissioner of Revenue*, 393 N.E.2d at 336:

> Close functional integration of each arm of a business organism is not an essential element of unitariness. The

> record shows Grace owned a majority share of Miller. Its president sat on Miller's board of directors. The investment world had notice of Grace's position with respect to Miller, and of the potentiality for, if not actual exercise of, its assumption of operational control. Grace apparently chose to refrain from active management in anticipation of its complete ownership of the Miller business. That political decision, however, did not serve to nullify the essentially unitary character of Grace's relationship with its Miller holding.

Although the purpose for which investments were acquired has frequently been a criterion for determining whether investment income is part of the unitary business,[5] the record before the hearing examiner was devoid of any information concerning the purposes for acquisition of shares. Indeed, it is highly possible that Woolworth's investments in foreign countries by means of independent subsidiary corporations were considered by Woolworth at the time they were made as the most desirable and potentially lucrative method for extending its unitary business into foreign countries.[6] Woolworth's failure to develop any evidence on this point or on any special use of the income in question may be fairly interpreted to indicate that the evidence, if known, would not support the taxpayer, since it is the taxpayer's burden to negate the existence of unitariness. *Mobil, supra.*

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[5] E.g., *Champion International Corp. vs. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (Ct.App.), *cert. den.* 89 N.M. 5, 546 P.2d 70 (1975).

[6] Prior to 1962, many domestic corporations found it advantageous to form subsidiaries to conduct their foreign business rather than mere operating divisions, because of certain tax advantages. *Dow Chemical Co. vs. Commissioner of Revenue*, 391 N.E.2d 253 (Mass. 1979). See also, *Montana Department of Revenue vs. American Smelting & Refining Co.*, 567 P.2d 901 (Mont. 1977), *appeal dismissed*, 434 U.S. 1042 (1978).

2. Inclusion of Gross-Up in Apportionable Business Income Is Not a Question of Constitutional Significance.

New Mexico gauges its income tax by the amount a taxpayer reports as federal taxable income. Section 7-2-2(S) N.M. Stat. Ann. (1978). (Jurisdictional Statement, Appendix D) As appellant concedes (Jurisdictional Statement, p. 14, n. 14), such a system is ordinarily desirable, providing simplicity for both the taxpayer and the state. *Getty Oil Co. vs. Taxation and Revenue Department*, 93 N.M. 589, 592, 603 P.2d 328, 331 (Ct.App. 1979). That the system is a desirable one, from a state's point of view, is evidenced by its popularity among the states.

Many states, by statute, have created a deduction from federal taxable income for "gross-up."[7] A judicial requirement that "gross-up" must be excluded from federal taxable income, in calculating New Mexico taxable income, is equivalent to providing for a non-statutory deduction, as the New Mexico Supreme Court correctly held. *Taxation and Revenue Dept. vs. F. W. Woolworth*, 624 P.2d at 32. Creation of such deductions by interpretation are traditionally disfavored.[8] Despite the existence of numerous situations in the Internal Revenue Code wherein "taxable income" includes amounts which the taxpayer did not actually receive in an ordinary "income" sense, Woolworth has indicated no instance wherein this Court

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[7] Massachusetts, for example, allows a deduction for dividends included in that income in the taxable year. *Dow Chemical Co. vs. Commissioner of Revenue*, 391 N.E.2d 253 (Mass. 1979).

[8] See, e.g., *Champion International Corp. vs. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (Ct.App.) *cert. den.* 89, N.M. 5, 546 P.2d 70 (1975); *Garlin vs. Murphy*, 51 Misc.2d 477, 273 N.Y.S.2d 374 (1976), *aff'd*, 34 N.Y.2d 921; *Commonwealth vs. Electrolux*, 362 Pa. 333, 67 A.2d 105 (1949); *Ebling Co. vs. Graves*, 259 App. Div. 427, 20 N.Y.S.2d 123 (1940), *aff'd*, 30 N.E.2d 726 (1940); *Katzenburg vs. Comptroller of the Treasury*, 263 Md. 189, 282 A.2d 465 (Ct.App. 1971).

has held that inclusion by a state of any of these artificial amounts violates the United States Constitution.[9] For example, in addition to gross-up, Subpart F income,[10] the federal jobs credit[11] and other federal provisions[12] provide in some instances for the artificial increase or failure to decrease "taxable income," in order to provide certain tax benefits to the claimant. To judicially create deductions not provided by statute would effectively destroy the ability of states to statutorily base their income taxes on the federal income tax; such a ruling would go far beyond the time honored bounds described by Justice Frankfurter in *Wisconsin vs. J. C. Penney Co.*, 311 U.S. 435, 444 (1941):

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

The mere fact that different states have different legislative opinions regarding the propriety of including such items as gross-up in taxable income does not elevate the inquiry to one of constitutional significance. *Moorman Mfg. Co. vs. Bair, supra.* The appropriate due process analysis is whether the state is taxing value out of all proportion to values connected with the

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[9] Woolworth's reliance on *In re Appeal of Norris Knosher,* (No. 203-80, decided Feb. 3, 1981, Vt.S.Ct.) is of no assistance to it. That case turned on the court's statutory interpretation of a statute dissimilar to New Mexico's.

[10] I.R.C. §§951-964; See *Dow Chemical Co. vs. Comm'r. of Revenue,* 391 N.E.2d 253 (Mass. 1979).

[11] I.R.C. §280C(a); I.R.C. §40; and I.R.C. §§50 A & B.

[12] E.G., I.R.C. §631(a); See *Champion International Corp. vs. Bureau of Revenue, supra.*

taxing state. *Moorman Mfg. Co. vs. Bair, supra; Hans Rees' Sons, Inc. vs. North Carolina ex rel. Maxwell, supra.* Although *Moorman* and many other cases make it clear that the burden of demonstrating such lack of proportionality rests squarely upon the shoulders of the taxpayer, there is no evidence at all in this record showing or tending to show such lack of proportionality. Cf., *Hans Rees' Sons, Inc. vs. North Carolina ex rel. Maxwell, supra; Norfolk & Western Ry. Co. vs. Missouri State Tax Comm'n.*, 390 U.S. 317 (1968).

The taxpayer elected to add to its federal taxable income certain amounts so that it could receive a substantial credit on its federal income taxes. I.R.C. §§78, 902(a) and 960(a)(1). Nothing in New Mexico law relieves them of the consequences of that election for state tax purposes. *Accord, Caterpillar Tractor Co. vs. Lenckos,* 77 Ill.App.3rd 90, 395 N.E.2d 1167 (1979), *aff'd* February 20, 1981, Ill.S.Ct. Moreover, while the gross-up does not fit within the commonly accepted notion of what income is,[13] it is clear that the taxpayer receives a substantial accretion to wealth by using the federal construct, an accretion to which it would not have been entitled, in the absence of federal legislation. The record shows that Woolworth was relieved of $25,502,782 of federal taxes which otherwise would have been due and payable by Woolworth, by virtue of being allowed to claim, as its own, foreign taxes which were actually paid by another person. In short, Woolworth pocketed $25,502,782 which it otherwise would not have had. Certainly this is a gain or benefit to a taxpayer sufficient to justify inclusion of the amount in taxable income. *In re Goodyear Tire & Rubber Co., supra; Albany International Corp. vs. Halperin,* 388 A.2d 902 (Me. 1978).

Since the gross-up is treated by federal tax law as a deemed received dividend, I.R.C. §78, it should retain its character as a

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[13] See *Dow Chemical Co. vs. Commissioner of Revenue,* 391 N.E.2d at 265.

dividend for state taxation purposes.[14] *Dow Chemical Co. vs. Commissioner of Revenue,* 391 N.E.2d at 265. If it is accepted that gross-up can be included in the taxable income reported to a state and if it retains its character as dividends, then it becomes in fact indistinguishable from other dividends paid by the foreign subsidiary corporation to its parent; obviously it should be included in business income, as other foreign source dividend income is included in the business income of a domestic parent corporation.

3. Appellant's Commerce Clause Argument Was Not Properly Raised Below, and Has No Merit.

The New Mexico Supreme Court held that Woolworth's claims as to violations of the Commerce Clause were answered against it by the Supreme Court in *Mobil. Taxation and Revenue Department vs. F. W. Woolworth,* 624 P.2d at 38. Woolworth now contends that "*any* state taxation (even by the state of commercial domicile) 'creates more than the risk of multiple taxation; it creates multiple taxation in fact.' " For this proposition, Woolworth relies upon *Japan Line, Ltd. vs. County of Los Angeles,* 441 U.S. 434 (1979). (Jurisdictional Statement, p. 20) This argument is a different one from any that was ever raised before in this proceeding.

Before the hearing examiner, Woolworth argued:

> Woolworth contends that the dividend income received from its foreign subsidiaries does not constitute 'business

[14] This treatment of the gross-up is especially reasonable, when the rationale behind gross-up is examined. Since Congress allowed a domestic corporation to claim a credit for foreign taxes actually paid by its foreign subsidiaries, the gross-up increases the domestic corporation's income to reflect the amount that it would have received as dividends from its foreign subsidiaries, had they not been required to pay those foreign taxes. *American Chicle Co. vs. United States,* 316 U.S. 450 (1942).

> income' within the meaning of the New Mexico statute and therefore such dividend income should not be included in apportionable income but should be separately allocated to Woolworth's state of commercial domicile.
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> Taxpayer's Memorandum of Law and Facts, at p. 5, submitted to Hearing Examiner and adopted as Brief-in-Chief in Court of Appeals.

Further, in the New Mexico Supreme Court, Woolworth argued: "if gross-up is non-business income it is allocated to the state of New York, Woolworth's commercial domicile." (Brief of Respondent Taxpayer, at 27, submitted in New Mexico Supreme Court) The issue raised below was conclusively decided by this Court in the *Mobil* case. The Court noted that, by requesting allocation, Mobil was foregoing the contention that local duplication of a foreign tax was completely proscribed; this Court further discussed the logical inconsistencies in allowing allocation but not apportionment, in face of the Commerce Clause challenge, since allocation would not necessarily result in a lesser tax burden. *Mobil Oil Corp. vs. Commissioner of Taxes of Vermont,* 445 U.S. at 446-447. In light of *Mobil's* holding, Woolworth has refined its argument, so that it now contends that *any* state taxation of dividend income violates the Commerce Clause. (Jurisdictional Statement, at 20).

The proper time to raise Woolworth's argument that any state taxation of foreign dividends violates the Commerce Clause was at the formal hearing before the hearing examiner. Section 7-1-25(A) N.M. Stat. Ann. (1978). *New Mexico Sheriff's & Police Ass'n. vs. Bureau of Revenue,* 85 N.M. 565, 514 P.2d 616 (Ct.App. 1973); *Till vs. Jones,* 83 N.M. 743, 497 P.2d 745 (Ct.App.), *cert. denied,* 83 N.M. 740, 497 P.2d 742 (1972). This Court has traditionally avoided deciding constitutional questions not properly raised in the state courts below. *Wilson vs. Cook,* 327 U.S. 474, 483-484 (1946).

Even had Woolworth properly raised the question below, the Department submits that its claim is meritless. This Court in *Mobil* rejected any attempt to apply the reasoning from *Japan Line,* a case dealing with ad valorem property taxes assessed directly upon instrumentalities of foreign commerce, to an income tax case. The Court reasoned as follows:

> Concurrent federal and state taxation of income, of course, is a well established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income.
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> 445 U.S. at 448.

Therefore, the Department submits that no provision of the Commerce Clause is violated by inclusion in apportionable business income dividends and "gross-up" received or deemed received by a business from its foreign subsidiaries.

4. Woolworth Has Made No Showing of Appropriate Adjustments to the Apportionment Formula.

Here, as in *Mobil,* the taxpayer concentrated its efforts in the lower courts to "achieve the subtraction of the asserted nonapportionable income from the pre-apportionment tax base." *Mobil Oil Corp. vs. Commissioner of Taxes of Vermont,* 445 U.S. at 432. Woolworth's discussion before the Hearing Officer of the apportionment formula appeared as follows:

> Woolworth feels that the apportionment formula should be modified as provided in Section 72-15A-39 of the Tax Act [now Section 7-4-19 N.M. Stat. Ann. (1978)] so as to fairly represent Woolworth's activities in New Mexico. Accordingly, Woolworth hereby petitions the New

> Mexico Commissioner of Revenue to add the property, payroll and sales of its foreign subsidiaries to the property, payroll and sales of Woolworth under the three-factor apportionment formula. Woolworth further requests, in the alternative, that the Commissioner modify the formula in any other manner he deems reasonable so as to fairly represent the extent of Woolworth's business activities in New Mexico. This might be accomplished, for example, by excluding the dividends (both cash and gross-up) from apportionable income in the Kentucky manner.
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> Taxpayer's Memorandum of Law and Facts, filed with Hearing Officer, at pages 21 and 22.

There is no indication in the record of the nature of the taxpayer's activities in New Mexico.[15] Nor is there even a suggestion in this record of what the property, payroll and sales of its foreign subsidiaries were during the tax period. The New Mexico Supreme Court properly concluded, on this record, that the taxpayer had failed to meet its burden of proof in attacking the apportionment formula: "one who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed." *Butler Bros. vs. McColgan, supra; Moorman Mfg. Co. vs. Bair,* 437 U.S. 267 (1978); *Gulf Oil vs. Morrison,* 120 Vt. 324, 141 A.2d 671 (1958); *W. R. Grace & Co. vs. Commissioner of Revenue,* 393 N.E.2d 330 (Mass. 1979).

Nor are the cases cited by taxpayer of any help in this regard. Contrasted with Woolworth, the taxpayers in those cases

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[15] Although a careful examination of the exhibits reveals the exact amount of the apportionment percentage, .463073% (representing the ratio of Woolworth's tangible property, payroll, and sales in New Mexico to the same items everywhere) (Transcript, p. 168), there is no indication of what activities this ratio represents.

presented voluminous evidence to meet their burdens of showing that the apportionment formulas as applied to them resulted in taxing them "out of all appropriate proportion to the business transacted in that state"[16] or "led to a grossly distorted result."[17]

CONCLUSION

Appellee Taxation and Revenue Department of the State of New Mexico respectfully submits that the questions upon which this cause depends are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Mexico.

Respectfully submitted,

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[16] *Hans Rees' Sons, Inc. vs. North Carolina ex rel Maxwell,* 283 U.S. 123 (1931).

[17] *Norfolk & Western Ry. Co. vs. Missouri State Tax Commission,* 390 U.S. 317 (1968).

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of May, 1981, I, Sarah E. Bennett, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Motion to Dismiss or Affirm to George W. Beatty and William L. Goldman, Counsel for the Appellant, at 1200 - 18th Street, NW, Washington, D.C. 20036 and to Michael D. Bray, at 919 Third Avenue, New York, New York 10022. I further certify that all parties required to be served have been served.

SARAH E. BENNETT
Assistant Attorney General